Supreme Court, U. S.
FILED
JAN 3 1977
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-951

Peter Skafte,

Appellant,

v.

Clela Rorex,

Appellee

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF COLORADO

# JURISDICTIONAL STATEMENT

JONATHON B. CHASE
American Civil Liberties
Union Foundation of
Colorado
School of Law
University of Colorado
Fleming Building
Boulder, Colorado 80309
(303) 492-8428

Attorney for Appellant

INDEX



CITATIONS

Cases

## JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the Supreme Court of the State of Colorado entered on August 23, 1976, upholding certain Colorado statutes which exclude parents who are aliens admitted to the United States for permanent residence from voting in local school elections. Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

## OPINION BELOW

The opinion of the Colorado Supreme Court is reported at 553 P.2d 830 and is set out in the Appendix, infra, pp. 1-14. The opinion of the District Court in and for the County of Boulder, Colorado is not reported but is set out in the Appendix, infra, pp. 15-20.

## JURISDICTION

The judgment of the Supreme Court of the State of Colorado was entered on August 23, 1976, and a notice of appeal was filed in that court on November 19, 1976. On November 26, 1976, Mr. Justice White extended the time for filing this Jurisdictional Statement to and including January 6, 1977. The jurisdiction of the Supreme Court to review this decision by appeal is conferred by 28 U.S.C. § 1257(2)(1970).

## STATUTES INVOLVED

Colorado Revised Statutes, Section 22-31-101(1) (1973):

> "Elector" or "qualified elector" means a person who is legally qualified to register to vote for state officers at general elections in this state and has resided in the school election precinct thirty-two days immediately preceding the election at which he offers to vote.

Colorado Revised Statutes, Section 22-31-106(2) (1973):

> Registration requirements for regular biennial school elections or for special school elections shall be the same as those governing general elections.

Colorado Revised Statutes, Section 1-2-101(1)(a)(1973):

> Every person who, on the date of the next ensuing election, has attained the age of eighteen years, possessing the following qualifications, shall be entitled to register to vote at all general, primary, and special elections:
>
> (a) He is a citizen of the United States.



Colorado Revised Statutes, Section 1-2-206(d)(1973):

> Questions answered by elector. (1) It is the duty of the county clerk and recorder to ask each qualified elector making application for registration and said elector shall answer correctly the following matters:
>
> ....
>
> (d) Whether a native-born or naturalized citizen of the United States. If a naturalized citizen, the applicant shall state how naturalized, whether by naturalization of self, parents, or otherwise; applicant shall state to his best knowledge, information, and belief when self, parents, or, if a female, when husband was naturalized, the place and time of naturalization, and by what court the naturalization papers were granted.

Colorado Revised Statues, Section 1-2-207(2) (1973):

> Each elector making application for registration shall take the following oath: "I,....., do solemnly swear (or affirm) that I am a citizen of the United States ....

## QUESTIONS PRESENTED

1. Whether the statutes of the State of Colorado, which forbid parents who are aliens admitted to the United States for permanent residence from voting in local school elections, violate the Equal Protection Clause of the fourteenth amendment to the United States Constitution.

2. Whether the statutes of the State of Colorado, which forbid parents who are aliens admitted to the United States for permanent residence from voting in local school elections, create an irrebuttable presumption that alien parents are not fit to vote, thus denying to such alien parents an interest in liberty without a hearing in contravention of the Due Process Clause of the fourteenth amendment to the United States Constitution.

## STATEMENT OF THE CASE

Appellant, a citizen of Denmark, has resided in the United States since August of 1962 and became a Permanent Resident Alien of this country in December of 1966. He has been a resident of Colorado since June of 1969. He is married to a United States citizen and there has been one child, Andrew Hakon (born March 6, 1972), of this marriage.



On April 9, 1974, appellant attempted to register for the next ensuing school election and was denied permission to register by appellee's predecessor in office (automatically replaced by the appellee herein pursuant to Rule 43(c)(1), Colo. App. R.) solely because appellant was not a citizen of the United States, as is required under Colorado law in order to vote in such elections. Section 22-31-101(1) of the Colorado Revised Statutes (1973), inter alia, defines an elector for the purpose of school elections as "[a] person who is legally qualified to register to vote for state officers at general elections." Section 22-31-106(2) states that registration requirements for all school elections "[s]hall be the same as those governing general elections." The substantive and procedural requisites for voting in a school election therefore incorporate by reference the requisites for voting in general elections; and, in order to vote in general elections one must be a United States citizen. Colo. Rev. Stat. §§ 1-2-101(1)(a), 206(d), 207(2)(1973).

Appellant thereupon commenced this action in the District Court in and for the County of Boulder, Colorado, seeking declaratory and injunctive relief on the grounds that present sections 22-31-101(1) and 106(2) of the Colorado Revised Statutes (1973), by incorporating the citizenship requirement for general elections, were in contravention of 42 U.S.C. §§1983 and 1981(1970). More specifically, appellant contended that the Colorado statutory scheme which barred him from voting in

school elections was in violation of the Equal Protection and Due Process Clauses of the fourteenth amendment and the Supremacy Clause of Article VI of the United States Constitution. On cross motions for summary judgment, the district court denied appellant's motion and granted appellee's, dismissing the action.

On appeal, appellant herein preserved his equal protection and due process claims. In an opinion written by Chief Justice Pringle affirming the decision below, the court first rejected appellee's argument that section 2 of the fourteenth amendment rendered inapplicable the Equal Protection Clause of the fourteenth amendment to any case in which alien access to the franchise was at issue. The court went on, however, to reject appellant's contention that the statutory scheme must meet strict judicial scrutiny in order to meet an equal protection challenge. Although it is not altogether clear, the court, relying on language found in several recent decisions of the United States Supreme Court, held that a state may permissibly exclude aliens from participating as members of the general political community as long as such exclusion is rationally related to a legitimate state objective and that "voting in school elections constitutes participation in the government policy-making process." App., infra, p. 8. Finding the exclusion of aliens from voting



in school elections "tailored", App., infra, p. 8 , to the state's "concern for loyalty, awareness of United States laws and customs, and the extent to which voters are informed about political affairs," App., infra, p. 11, the court found no violation of the Equal Protection Clause. The court also rejected appellant's argument that the statutory scheme created an irrebuttable presumption in violation of the Due Process Clause, observing that, "The statutes do not create an irrebuttable presumption. There is no fact presumed from the status of alienage...." App., infra, p. 10. The court also held that the exclusion did not violate the Supremacy Clause.

Appellant does not appeal from that part of the court's decision denying his Third and Fourth Claims for Relief based on the Supremacy Clause and 42 U.S.C. §1981 (1970).

THE QUESTIONS ARE SUBSTANTIAL

1. Whether a state, consistent with the Equal Protection Clause, may deny parents who are aliens admitted to the United States for permanent residence the right to vote in school elections presents a most substantial question.

The court below perceived the issue to be whether aliens have the right to vote in general political elections.

Projecting language found in opinions of this Court in Sugarman v. Dougall, 413 U.S. 634 (1973), and In Re Griffiths, 413 U.S. 717 (1973), the Colorado Supreme Court began with the major premise that aliens do not have a constitutional right to participate in general political elections. From there the court moved to the next proposition that school elections are of sufficient general community concern to require that all eligible voters be permitted to participate in them. Kramer v. Union Free School District, 394 U.S. 621 (1969). The court then reached the logical conclusion that, since school elections were general political elections, aliens could constitutionally be excluded from them. What the decision of the Colorado Supreme Court entirely ignores, however--and what makes the question posed herein of great importance--is that appellant is not suing as a member of the general body politic seeking access to the franchise, but as a parent asserting his fundamental right to participate meaningfully in the decision making process affecting his child's education.

Relying on a long and unbroken line of decisions of this Court, beginning with Meyer v. Nebraska, 262 U.S. 390, 399-401 (1923), then Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925), then Wisconsin v. Yoder, 406 U.S. 205 (1972), and Wright v. Council of City of Emporia, 407 U.S. 451, 469 (1972), and Stanley v. Illinois, 405 U.S. 645 (1972),



appellant argued that there is a clearly recognized fundamental right of parents to participate in the decision making process affecting their child's education. From there appellant asserted that when a state has chosen to isolate the educational decision making process by providing for special elections only affecting education, then, in order to exclude any parent, the exclusion must meet the rigorous demands of strict constitutional scrutiny. The fact that the matter to be voted upon may also be of sufficient importance to other members of the community so that they may not constitutionally be excluded from the decision making process is a matter of pure coincidence. Appellant is asserting a very special and direct interest in the matter which this Court has recognized as deserving of constitutional protection as a fundamental right. And, of course, when the only class excluded from enjoyment of this fundamental right is aliens, the constitutional infirmity is compounded. See Truax v. Raich, 239 U.S. 33, 41 (1915).

Whether or not the fundamental right of a parent to direct his or her child's education includes the right to participate in a local school election so that parents who are aliens admitted for permanent residence in the United States may not constitutionally be excluded is an issue of great constitutional significance and is nowhere addressed in the decision of the Colorado Supreme Court, below.

2. The question of whether the statutes of Colorado, by excluding parents who are aliens admitted for permanent residence in the United States from voting in local school elections, create an irrebuttable presumption of unfitness to deprive appellant of an interest in liberty without due process of law also raises a very substantial constitutional question.

Although the current status of the irrebuttable presumption doctrine as it affects interests in property is in some doubt, see Weinberger v. Salfi, 422 U.S. 749 (1975), it retains its vitality with respect to interests in liberty. Turner v. Department of Employment Security 423 U.S. 44 (1975). Recent decisions of this Court suggest that the demands of procedural due process may have to be met in circumstances in which strict scrutiny under substantive due process or equal protection analysis would not be required. Chase, The Premature Demise of Irrebuttable Presumptions, 47 Colo.L.Rev. 653, 681-84, (1976). This could come about in either of two ways. First, the imposition on what is clearly recognized as a constitutionally protected fundamental right may not amount to a "penalty" on that right in a constitutional sense, see Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974), sufficient to require strict scrutiny under substantive due process or equal protection. Such a case might be Cleveland Board of Education v. La Fleur, 414 U.S. 632 (1974), in which



it is unlikely that the Court would have found the challenged forced maternity leave policy to have penalized the fundamental right "to bear or beget a child," 414 U.S. at 640, so as to require strict scrutiny under substantive due process. Compare Dandridge v. Williams, 397 U.S. 471 (1970). Yet the impact was sufficient to require observance of procedural due process. It may be that in the case at bar the Court would be unwilling to characterize the degree of imposition on the parental right to direct a child's education as a penalty for purposes of applying strict scrutiny, but would, surely, find sufficient infringement to require compliance with procedural due process.

A second way in which procedural due process may have to be satisfied in circumstances in which strict scrutiny under substantive due process or equal protection would not be required is if the Court were to define "liberty" within the meaning of the Due Process Clause of the fourteenth amendment as something less than an independently recognized fundamental right. While all fundamental rights are surely also interests recognized within the concept of liberty, it may be that interests recognized as liberty for purposes of requiring compliance with procedural due process may be more numerous than those limited interests which are deserving of the tremendous constitutional protection afforded by the "compelling state interest" test required by substantive due process. The relationship between the concept of liberty in the

fourteenth amendment and fundamental rights recognized as independent constitutional rights has never been fully explicated by the Court. See Hampton v. Mow Sun Wong, 96 S.Ct. 1895, 1905 (1976); id. at 1913-14 (Mr. Justice Rehnquist, dissenting); Massachusetts Board of Retirement v. Murgia, 96 S.Ct. 2562, 2571 (1976) (Mr. Justice Marshall, dissenting). In the case at bar it may be that, although the Court would be unwilling to characterize the parental rights involved as "fundamental" for purposes of applying strict scrutiny, those rights would surely be characterized as interests in "liberty" requiring compliance with procedural due process.

If, for either of the two reasons suggested above, the Court should find the statutes at issue to infringe upon an interest in liberty, although not finding a penalty on a fundamental right, then this is certainly a case in which an irrebuttable presumption is created in contravention of the right to due process. The court below, while identifying the objectives to be attained by excluding aliens from voting as "concern for loyalty, awareness of United States laws and customs, and the extent to which voters are informed about political affairs," went on to say that "these interests are not equivalent with the purpose of the statute." App., infra, p. 11. Relying on Mourning v. Family Publications Service, Inc., 411 U.S. 356, 377 (1973), the court below defined



purpose in terms of means rather than ends. The court reasoned that if it was the intention of the legislature to exclude aliens, then that was the statutory purpose and nothing was presumed. This analysis is clearly erroneous, however, since defining statutory purpose in order to determine the presence of an irrebuttable presumption must be accomplished by identifying statutory objectives, not the means employed to achieve them. Chase, The Premature Demise of Irrebuttable Presumptions, 47 Colo.L.Rev. 653, 670-71, 689 n. 119 (1976).

Given the infringement of an interest in liberty, accomplished by means of an irrebuttable presumption of lack of fitness, a hearing is required by the Due Process Clause to determine whether the facts presumed exist in the particular case. In the case at bar, assuming the constitutional validity of the objectives of the Colorado statute in excluding aliens from voting in school elections, a simple procedure could be devised for assuring realization of those objectives by means of testing and an oath of loyalty. Although appellant hardly recommends that such devices be employed, such would be a far less drastic method than wholesale exclusion.

## CONCLUSION

For the reasons stated above, jurisdiction should be noted.

Respectfully submitted,

JONATHON B. CHASE
American Civil Liberties Union Foundation of Colorado
School of Law
University of Colorado
Fleming Building
Boulder, Colorado
80309
(303) 492-8428

Attorney for Appellant

## APPENDIX 1

IN THE SUPREME COURT
OF
COLORADO

NO. 27008

PETER SKAFTE,

Plaintiff-Appellant,

v.

CLELA ROREX, BOULDER COUNTY CLERK,

Defendant-Appellee.

Appeal from the District Court
of Boulder County
Honorable William D. Neighbors, Judge

EN BANC JUDGMENT AFFIRMED

Jonathon B. Chase,

Attorney for Plaintiff-Appellant.

French and Riddle,
Robert W. Stone,

Attorney for Defendant-Appellee.

MR. CHIEF JUSTICE PRINGLE delivered the opinion of the Court.

## APPENDIX 2

The appellant, Peter Skafte, a permanent resident alien, brought this suit in Boulder County District Court, seeking a declaratory judgment that the Colorado statutes which deny aliens the right to vote in school elections are unconstitutional. The appellant also sought appropriate injunctive relief. Specifically, the appellant claimed that such a limitation violates the Equal Protection Clause and Due Process Clause of the Fourteenth Amendment, and the Supremacy Clause of Article VI of the United States Constitution. The district court granted summary judgment in favor of the appellee, the Boulder County Clerk, holding the statutory provisions constitutional. We affirm.

The appellant attempted to register for a school election with the Boulder County Clerk and permission to do so was denied by the appellee for the sole reason that the appellant was not a United States citizen. This denial was based on 1971 Perm. Supp., C.R.S. 1963, 123-31-1(3)[1] and 1965 Perm. Supp., C.R.S. 1963, 123-31-6(a).[2] Section 123-31-1(3) defines an

---

1 Now section 22-31-101(1), C.R.S. 1973.

2 Now section 22-31-106(2), C.R.S. 1973.

## APPENDIX 3

elector for the purposes of school elections as a "person who is legally qualified to register to vote for state officers at general elections" and who meets residency requirements. Section 123-31-6(2) provides that registration requirements for school elections "shall be the same as those governing general elections." Consequently, the substantive and procedural requirements concerning general elections are incorporated into school elections. Under C.R.S. 1963, 49-3-1(1)(b),[3] one qualification that elections must meet is that of United States citizenship.

I.

The appellant asserts that the statutes prohibiting permanent resident aliens from voting in school elections violate the Equal Protection Clause.

A.

At the outset, the registrar contends that the Equal Protection Clause has no application to the issue in this case. For this proposition, she relies on section 2 of the Fourteenth Amendment.

---

3 Now section 1-2-101(1)(a), C.R.S. 1973.

APPENDIX 4

Section 2 provides, in part:

> "[W]hen the right to vote at any election for the choice of electors for president and vice-president of the United States, representatives in congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state." (Emphasis supplied.)

The registrar argues that section 2 makes the Equal Protection Clause of the Fourteenth Amendment inapplicable to this case, since the specific wording of the section shows that those adopting the Fourteenth Amendment considered citizenship a valid classification in legislation dealing with the franchise. We do not agree with this contention.

Local school elections are not contained in the types of elections expressly listed in section 2. Moreover,

APPENDIX 5

the implicit sanction of a citizenship requirement contained in section 2 for the elections there listed does not warrant a conclusion that the Equal Protection Clause is inapplicable in the instant case. Indeed, the United States Supreme Court has rejected the general proposition that section 2 was intended to supplant the Equal Protection Clause in the area of voting rights. Richardson v. Ramirez, 418 U.S. 24, 94 S.Ct. 2655, 41 L.Ed.2d 551 (1974); Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964).

Nevertheless, we do believe that section 2 is helpful in deciding the constitutional questions raised in this appeal. The section demonstrates, as an historical matter, that the requirement of citizenship to exercise the franchise was assumed to be a valid one at the time the Fourteenth Amendment was adopted. Hence, in deciding the constitutional issues in this case, we are mindful of the language of section 2.

B.

The appellant asserts that the alienage classification created here requires strict judicial scrutiny. The United States Supreme Court has consistently used language suggesting that citizenship with respect to the franchise

is not a suspect classification and that therefore the compelling interest test does not apply. See Hill v. Stone, 421 U.S. 289, 95 S.Ct. 1637, 44 L.Ed.2d 172 (1975); Sugarman v. Dougall, 413 U.S. 634, 93 S.Ct. 2842, 37 L.Ed.2d 853 (1973); Kramer v. Union Free School District No. 15, 395 U.S. 621, 89 S.Ct. 1886, 23 L.Ed. 2d 583 (1969).

C.

We hold that the state's citizenship requirements for a school district election do not contravene the Equal Protection Clause of the Fourteenth Amendment. The state has a rational interest in limiting participation in government to those persons within the political community. Aliens are not a part of the political community.

The United States Supreme Court has recognized a state's valid interest in establishing a government and in limiting participation in that government to those within the concept of a political community. Sugarman v. Dougall, supra, at 642. The Supreme Court has noted that "alienage itself is a factor that reasonably could be employed in defining 'political community.'" Sugarman v. Dougall, supra, at 649. Indeed, the Court has further stated that "implicit in many of this Court's voting rights decisions



is the notion that citizenship is a permissible criterion for limiting such rights." Sugarman v. Dougall, supra, at 649.

The appellant contends that this justification satisfies the Equal Protection requirement only as it pertains to voting in general elections. He contends, however, that a school election is a "special interest" election, and therefore the proposition that a citizenship requirement is valid for general elections does not apply.

We believe that a school election is an election which falls within the class of cases prohibiting aliens from voting contemplated by the Supreme Court in Sugarman v. Dougall, supra. We point out that school districts are governmental entities. Elections involving local government units "have always been a major aspect of our system, and their responsible and responsive operation is today of increasing importance to the quality of life of more and more of our citizens." Avery v. Midland County, 390 U.S. 474, 481, 88 S.Ct. 1114, 1118, 20 L.Ed.2d 45, 51 (1968). Further, in Kramer v. Union Free School District No. 15, supra, the Supreme Court indicated that school elections are elections involving participation by the political community.

Moreover, voting in school elections involves participation in the decision making process of the polity, a factor which indicates the "general" nature of such elections. It is in fact a determination of participation or not in the government policy-making process which often has been crucial in deciding cases contesting alienage classifications. The Supreme Court in In Re Griffiths, 413 U.S. 717, 93 S.Ct. 2851, 37 L.Ed.2d 910 (1973), held unconstitutional a requirement that bar examinees be citizens. The court noted that the acts of a lawyer "hardly involve matters of state policy" and that the status of holding a license to practice law does not "place one so close to the core of the political process as to make him a formulator of government policy." 413 U.S. at 729, 93 S.Ct. at 2858, 37 L.Ed.2d at 919 (footnote omitted).

The administration of school districts, however, does involve one in matters of "state policy" and entails the formulation of such policy. Therefore, voting in school elections constitutes participation in the government policy-making process.

Finally, the statutory classification denying aliens the right to vote is properly tailored to the state's interest.



In Perkins v. Smith, 370 F.Supp. 134 (D.Md. 1974), aff'd, _____ U.S. ____, 96 S.Ct. 2616, 49 L.Ed.2d 368 (1976), the court upheld as constitutional the exclusion of resident aliens from grand and petit jury panels in state and federal courts. The court noted:

> "[I]t is the process of filing for citizenship that establishes... loyalty; any attempt at prior screening would undercut the efficiency and significance of existing procedures. Therefore, although the presumption that all aliens owe no allegiance to the United States is not valid in every case, no alternative to taking citizenship for testing allegiance can be devised, so that we conclude that the classification is compelled by circumstances, and that it is justifiable." 370 F.Supp. at 138.

Thus, we conclude that the State has shown a reasonable basis justifying the classification here challenged. Consequently, the citizenship requirement in school elections does not deprive the appellant of equal protection of the laws.

II.

Next, the appellant contends that the prohibition against voting placed upon resident aliens creates a conclu-

sive presumption in violation of the Due Process Clause of the Fourteenth Amendment.

The statutes do not create an irrebuttable presumption. There is no fact presumed from the status of alienage; rather, the legislature intended to prohibit aliens from voting, and the classification exactly achieves that purpose. The statutes do not purport to be concerned with prohibiting from voting persons with some common trait, which trait is conclusively presumed from the status of alienage. Instead, the statutes only purport to exclude aliens from voting. Thus, they do not create a conclusive presumption.[4]

---

4

In Mourning v. Family Publications Service, Inc., 411 U.S. 356, 93 S.Ct. 1652, 36 L.Ed.2d 318 (1973), the Supreme Court sustained the constitutionality of a regulation in the Truth and Lending Act which made disclosure provisions applicable whenever credit is offered to a consumer for which a finance charge is imposed or which is payable in more than four installments necessarily included a finance charge, stating:

(Footnote continued)



While it is true that the state interest justifying the classification on equal protection grounds includes a concern for loyalty, awareness of United States laws and customs, and the extent to which voters are informed about political affairs, these interests are not equivalent with the purpose of the statute. To hold otherwise would turn the conclusive presumption doctrine into a "virtual engine of destruction for countless legislative judgments which have heretofore been thought wholly consistent with the Fifth and Fourteenth Amendments to the Constitution." Weinberger v. Salfi, 422 U.S. 749, 772, 95 S.Ct. 2457, 2470, 45 L.Ed.2d 522, 543 (1975).

III.

Finally, the appellant asserts that the statutory voting prohibition is unlawful, either because it is an attempt

> "The rule . . . does not presume that all creditors who are within its ambit assess finance charges, but, rather, imposes a disclosure requirement on all members of a defined class in order to discourage evasion by a substantial portion of that class." 411 U.S. at 377, 93 S.Ct. at 1644, 36 L.Ed. 2d at 334.

to regulate immigration and naturalization, or because it violates the Supremacy Clause. This latter argument is premised on the appellant's contention that the Congress has pre-empted the states in the regulation of aliens.

Power to regulate immigration unquestionably rests exclusively with the federal government. Graham v. Richardson, 403 U.S. 365, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971); Takahashi v. Fish & Game Commission, 334 U.S. 410, 68 S.Ct. 1138, 92 L.Ed. 1478 (1948). But, the Supreme Court has never held that every state provision which deals with aliens is a regulation of immigration and therefore pre-empted by this constitutional power. DeCanas v. Bica, ____ U.S. ____, 96 S.Ct. 933, 47 L.Ed.2d 43 (1976). As the court has noted, a regulation of immigration is "essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain." DeCanas, supra, 96 S.Ct. at 936, 47 L.Ed. 2d at 48-49. The statutes prohibiting aliens from voting do not affect these considerations and "even if such local regulation has some purely speculative and indirect impact on immigration, it does not thereby become a constitutionally proscribed regulation of immigration...." DeCanas, supra, 96 S.Ct. at 936, 47 L.Ed.2d at 49.



Furthermore, the federal legislation respecting aliens contained in the Immigration and Nationality Act, 8 U.S.C. § 1101 et seq. (INA) does not pre-empt the challenged statutes. The challenged statutes are not in conflict with the INA. Therefore, a conclusion that the INA does pre-empt the type of regulation imposed by the challenged statutes would be warranted only if "the nature of the regulated subject matter permits no other conclusion, or...Congress has unmistakably so ordained." Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142, 83 S.Ct. 1210, 1217, 10 L.Ed.2d 248, 257 (1963). Such a conclusion is not warranted in this case.

Voter qualification is a primary example of an area which the states have historically occupied. Sugarman v. Dougall, supra; Oregon v. Mitchell, 400 U.S. 112, 91 S.Ct. 260, 27 L.Ed.2d 272 (1970); Carrington v. Rash, 380 U.S. 89, 85 S.Ct. 775, 13 L.Ed.2d 675 (1965). Furthermore, Congress has not manifested an intent to remove from the states the exercise of this power, nor can it with respect to local elections. "Only a demonstration that complete ouster of state power--including state power to promulgate laws not in conflict with federal laws--was 'the clear and manifest purpose of Congress' would justify

that conclusion." DeCanas, supra, 96 S.Ct. at 937, 47 L.Ed.2d at 50 (citations omitted). The appellant has not made such a demonstration. As stated by the Supreme Court, there is no indication "in either the wording or legislative history of the INA that Congress intended to preclude even harmonious state regulation touching on aliens in general . . . ." DeCanas, supra, 96 S.Ct. at 937-38, 47 L.Ed.2d at 50. Therefore, the challenged statutes are not invalid under the Supremacy Clause.

The judgment is affirmed.

MR. JUSTICE LEE does not participate.



IN THE DISTRICT COURT IN AND
FOR THE COUNTY OF BOULDER
STATE OF COLORADO

Action No. 74-1089-1

BE IT REMEMBERED, that heretofore and on to-wit, the 10th day of March, 1975, the same being one of the regular juridicial days of the July A.D. 1974 Term of the Court, the following proceedings, inter alia, were had and entered of record in said Court:

PETER SKAFTE
VS.
HENRY C. PUTNAM

William D. Neighbors
Judge

Kay Nugent
Deputy Clerk

Elizabeth Johnston
Reporter

A P P E A R A N C E S:

Jonathon B. Chase
Plaintiff/People

Joseph C. French
Defendant

RULING ON MOTIONS FOR SUMMARY JUDGMENT AND ORDER

The plaintiff's and defendant's respective motions for summary judgment came on for hearing pursuant to Rule 56 C.R.C.P. at 10:00 a.m. August 21, 1974. Having considered the pleadings and the briefs and oral arguments of counsel for the parties, the Court finds that the plaintiff's motion for summary judgment should be denied and the defendant's motion for summary judgment should be granted.

I. INTRODUCTION.

The plaintiff is a permanent resident alien of the United States and has brought this action seeking to establish his right, as a parent, to register and vote in all school elections. Plaintiff has attempted to register for a school election and permission to do so was refused by defendant for the sole reason that plaintiff is not a citizen of the United States. Plaintiff now seeks a determination that the statutory scheme which precludes aliens from voting in all school elections is unconstitutional. The pertinent statutes being challenged as unconstitutional are C.R.S. 123-31-1 (3) (1963, as amended) and C.R.S. 123-31-6(2) (1963, as amended). C.R.S. 123-31-1(3) defines an elector for the purpose of school elections as "[A] person who is legally qualified to register to vote for state officers at general



elections . . ." and who meets the residency requirements. C.R.S. 123-31-6(2) states that registration requirements for all school elections "shall be same as those governing general elections." Thus the substantive and procedural requirements of Chapter 49 of the Colorado Revised Statutes concerning general elections are incorporated by reference into Chapter 123. Among the basic qualifications for one to be entitled to register to vote in general, primary and special elections and which is set forth in C.R.S 49-3-1(1)(b) (1963, as amended) is, "He shall be a citizen of the United States."

II. CONCLUSIONS OF LAW.

The burden upon one assailing the constitutionality of a legislative act is found in the cardinal rule that every regularly adopted legislative act is presumed to be constitutional and the one attacking the validity thereof has the burden of showing it is unconstitutional beyond a reasonable doubt. Mosco v. Dunbar, 135 Colo. 172, 309 P.2d 581 (1957); Eachus v. People, 124 Colo, 454, 348 P.2d 885 (1951); Rinn v. Bedford, 102 Colo. 475, 84 P.2d 827 (1938). In order to meet this burden the plaintiff must first establish that the right being asserted is secured by some constitutional provision. This the plaintiff

has not done and cannot do. The Court is aware of no provision in either the Constitution of the United States or the Constitution of the State of Colorado which creates or gives rise to a right to vote for aliens in school elections or general elections. Nor can it be argued that such a right arises under the Equal Protection Clause of the Fourteenth Amendment. As stated by the United States Supreme Court in Sugarman v. Dougall, 413 U.S. 634, 93 S.Ct. 2842, 37 L.Ed.2d 853 (1973):

> This Court has never held that aliens have a constitutional right to vote . . . under the Equal Protection Clause. Indeed, implicit in many of this Court's voting rights decisions is the notion that citizenship is a permissible criterion for limiting such rights. 413 U.S. at 648-649.

Absent a constitutional foundation for the alleged right of aliens to vote, plaintiff's grievance with the statutory scheme involved herein is within the exclusive province of the legislature. "In the construction of statutes courts are not guardians of the rights of people except as those rights are secured by constitutional provision, and if a statute does not offend the Constitution it is the duty



of courts to carry it into execution according to its intent and purpose." Barbers Union v. Industrial Commission, 128 Colo. 121, 134, 260 P.2d 941 (1953); Mosco v. Dunbar, supra.

> The protection against unwise or oppressive legislation, within constitutional bounds, is by an appeal to the justice and patriotism of the representatives of the people. If this fails, the people in their sovereign capacity can correct the evil; but courts cannot assume their rights. The judiciary can only arrest the execution of a statute when it conflicts with the constitution. It cannot run a race of opinions upon points of right, reason and expedience with the law making power. People ex rel Rhodes v. Fleming, 10 Colo. 553, 565, 16 P. 298 (1887).

It is therefore the conclusion of the Court that, while plaintiff has made several cogent arguments in support of his contention that alien parents should be allowed to vote in all school elections, he has tendered them to the wrong forum. The Court has neither the power nor the authority to subject legislation to judicial scrutiny upon the allegation that it denies a right when the very right alleged has not yet been created by either constitutional amendment or legislative act.

APPENDIX 20

III. ORDER.

For the reasons set forth herein, plaintiff's motion for summary judgment is denied and the defendant's motion for summary judgment is granted. It is therefore ordered that plaintiff's complaint be dismissed with prejudice.

BY THE COURT:

/s/ William D. Neighbors
Judge

cc: Jonathon B. Chase
Joseph C. French

APPENDIX 21

Filed November 19, 1976

IN THE SUPREME COURT
OF
COLORADO

No. 27008

PETER SKAFTE,

Plaintiff-Appellant,

vs.

CLELA ROREX, BOULDER COUNTY CLERK,

Defendant-Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Peter Skafte, the appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Colorado, affirming the dismissal of the complaint, entered in this action on August 23, 1976.

This appeal is taken pursuant to 28 U.S.C. § 1257(2) (1970).

Jonathon B. Chase #1980
Counsel for Appellant
University of Colorado
School of Law
Boulder, CO 80302
Telephone: 492-8428

for: AMERICAN CIVIL
LIBERTIES UNION
OF COLORADO

## APPENDIX 22

### CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true and correct copy of the foregoing Notice of Appeal to the Supreme Court of the United States was mailed, postage prepaid in the United States mails, to Joseph French, 720 Pearl Street, Boulder, Colorado 80302, on this 18th day of November, 1976.

/s/ Jonathon B. Chase

Supreme Court, U. S.
FILED
MAR 22 1977
MICHAEL RODAK, JR., CLERK

In The

# Supreme Court of the United States

October Term, 1976

No. 76-951

PETER SKAFTE,

*Appellant,*

vs.

CLELA ROREX,

*Appellee.*

On Appeal from the Supreme Court
of the State of Colorado

## MOTION TO DISMISS FOR LACK OF JURISDICTION AND BRIEF IN SUPPORT OF MOTION TO DISMISS

JOSEPH C. FRENCH
Application to Supreme
Court pending

720 Pearl Street
Boulder, CO 80302
(303) 449-3891

*Attorney for Appellee*

COCKLE PRINTING CO., 1822 St. Mary's Ave., Omaha

## TABLE OF CONTENTS



## CITATIONS

In The

# Supreme Court of the United States

October Term, 1976

—o—

No. .....

—o—

PETER SKAFTE,

*Appellant,*

vs.

CLELA ROREX,

*Appellee.*

—o—

**On Appeal from the Supreme Court of the State of Colorado**

—o—

## MOTION TO DISMISS FOR LACK OF JURISDICTION AND BRIEF IN SUPPORT OF MOTION TO DISMISS

—o—

### I.

### MOTION TO DISMISS FOR LACK OF JURISDICTION

The appellee hereby moves this Court to dismiss the above-captioned case for lack of jurisdiction because it fails to raise a substantial federal question.

## II.

## BRIEF IN SUPPORT OF MOTION TO DISMISS

---

### The Questions Presented Are Not Substantial

Whether the Colorado Statute which excludes non-citizens from voting in school elections violates the Equal Protection Clause does not present a substantial federal question.

Appellant asserts that this Court has jurisdiction under Title 28 U. S. C. § 1257 (2) (1970). However, under that statute, the Court lacks jurisdiction if the appellant does not show that the constitutional question presented is a substantial federal question. *Zucht v. King,* 260 U. S. 174, 176 (1922).

The appellant's central contention is that the question of whether a state, consistent with the Equal Protection Clause, may deny a non-citizen the right to vote in local school elections should be considered by the Court.

However, the Court has spoken to the issues sought to be presented by the appellant on a number of occasions, and therefore the question presented is not substantial enough to warrant further consideration by the Court.

It has long been established that a state has the right to regulate access to the franchise in state, and even federal elections. *See, e. g., Dunn v. Blumstein,* 405 U. S. 330 (1972); *Kramer v. Union Free School District,* 395 U. S. 621, 637 (1969); *Lassiter v. Northampton Election Board,* 360 U. S. 45 (1958).



Dealing with a fact situation more closely related to the case at bar the Court has recently applied the Equal Protection Clause to the rights of aliens in *Sugarman v. Dougall,* 413 U. S. 634 (1973). In considering a state's exclusion of aliens from public service and utilizing a "close scrutiny" test, the Court limited its holding in the following language:

> (O)ur scrutiny will not be so demanding where we deal with matters resting firmly within a state's constitutional prerogative. This is no more than a recognition of the state's historical power to exclude aliens from participation in its democratic political institutions. . . . This Court has never held that aliens have a constitutional right to vote or to hold high public office under the Equal Protection Clause. Indeed, implicit in many of this Court's voting rights decisions is the notion that citizenship is a permissible criterion for limiting such rights.

*Sugarman v. Dougall, supra,* 413 U. S. at 638. *See, also, Hill v. Stone,* 421 U. S. 289 (1975); *Skafte v. Rorex,* — Colo. —, 553 P. 2d 830 (1976) (a copy of which is appended to appellant's jurisdictional statement at Appendix 5 through 9).

The Court has decided a number of times that until an alien becomes naturalized as a citizen he has outstanding loyalties, and while he may be entitled to equal protection of the laws, he does not have legal parity with a citizen. *See, e. g., Sugarman v. Dougall, supra; Harishades v. Shaughnessy,* 342 U. S. 580 (1952). Therefore, the question raised by the appellant is not a substantial Federal question.

The appellant's argument that the Colorado Statute creates an irrebuttable presumption in violation of the Due

Process Clause is a semantical "red herring". The fact that there is a line of cases dealing with the fundamental right of a parent to have a significant say in family affairs and the affairs of his children does not alter the fact that the cases cited above resolve the issue of whether or not the non citizen has a right to vote. Every election has some impact upon the children of a resident alien. The fact that a local school district election is involved does not alter the fact that school district elections have important governmental consequences. *See, e. g., Kramer v. Union Free School District,* 395 U. S. 621 (1969).

To accept the appellant's argument that the Due Process Clause requires an individualized hearing on his qualifications to vote in any instance where the rights or welfare of his children may be affected would of necessity lead to the conclusion that the appellant is entitled to an individualized hearing on his right to vote in any general governmental election. For example, the appellant would be entitled to vote in elections which involve the expenditure of general governmental funds on education, or in elections which involve expenditures outside the educational area which may result in a reduction of the educational budget, and thus directly affect the appellant's children.

The questions suggested under the irrebuttable presumption analysis do not raise substantial federal questions. The Court has recently acted to narrow the use of that analysis under the due process clause. *See, e. g., Mourning v. Family Publications Service, Inc.,* 411 U. S. 356 (1973). In *Weinberger v. Salfi,* 422 U. S. 749 (1975), the Court considered an irrebuttable presumption argument that social security provisions which required marriage for at least nine months prior to death in order for a widow and child to be entitled to social security death benefits, and considered the difficulty with the irrebuttable presumption analysis when applied outside the narrow areas in which the irrebuttable presumption analysis was originally used. The manner in which the Court distinguished *Vlandis v. Kline,* 412 U. S. 441 (1973) from the facts before it in the *Salfi* case resolves the question raised by the appellant in this case.



The Court stated that, unlike the statute involved in the *Vlandis v. Kline* case, the Social Security Act does not purport to speak in terms of the *bona fides* of the parties to a marriage, but then make plainly relevant evidence of such *bona fides* inadmissible. To the contrary, in the *Salfi* case the Court determined that the legislature imposed certain requirements which it considered to be consistent with underlying policy objectives to be used as a test for eligibility. To establish eligibility for the social security benefits the appellant only had to establish compliance with the nine-month requirement. The statute did not talk about any presumptions or ultimate facts being drawn from the nine-month period, even though there were obviously legislative considerations in setting that nine-month limitation. *See, Weinberger v. Salfi,* 422 U. S. 749, 772.

The Court determined that absent the limitation which it imposed,

> The District Court's extension of the holdings of *Stanley, Vlandis,* and *LaFleur* to the eligibility requirement in issue here would turn the doctrine of those cases into a virtual engine of destruction for countless legislative judgments which have heretofore

been thought wholly consistent with the Fifth and Fourteenth Amendments to the Constitution.

*Weinberger v. Salfi,* 422 U. S. at 772.

To accept the appellant's argument that citizenship as a requirement for access to the franchise creates an irrebuttable presumption that the appellant is not qualified to vote, and therefore entitles him to an individualized hearing on whether or not he is qualified to vote would be to render the legislative judgment that aliens are not sufficiently interested in the political community to vote a nullity. As stated in the *Salfi* case, such a decision would open the door to use of the irrebuttable presumption analysis to challenge any legislative classification.

The legislative classification based upon alienage is simply another way of stating that aliens who have not become citizens have not demonstrated a commitment to our form of government and continue to have outstanding loyalties. *See, e. g., Harishades v. Shaughnessy,* 342 U. S. 580 (1952); *Sugarman v. Dougall,* 413 U. S. 634 (1973); *c. f., Dunn v. Blumstein,* 405 U. S. 330 (1972). Exclusion of aliens from the franchise does not create any sort of factual presumption entitling the alien to an individualized hearing. *See, Weinberger v. Salfi,* 422 U. S. 749 (1975). There is no better basis for legislative classification and regulation of access to the franchise and there is no alternative to using citizenship as a criterion for testing allegiance and voting qualifications. *C. f., Perkins v. Smith,* 370 F. Supp. 134 (1974), *aff'd mem.,* 426 U. S. 913 (1976).



## CONCLUSION

Since the Court has already placed limitations on the use of the irrebuttable presumption analysis, the question raised by the appellant does not inject a substantial Federal question which is otherwise lacking in this appeal. Therefore, we respectfully submit that the Court should dismiss the appeal as not presenting a substantial Federal question.

Respectfully submitted,

JOSEPH C. FRENCH
Application to Supreme Court pending

720 Pearl Street
Boulder, CO 80302
(303) 449-3891

*Attorney for Appellee*